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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/749,366	12/31/2003	Paul T. Van Gompel	19,288	1191
23556	7590	12/19/2008		
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EXAMINER				
KIDWELL, MICHELE M				
ART UNIT		PAPER NUMBER		
3761				
MAIL DATE		DELIVERY MODE		
12/19/2008		PAPER		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/749,366

**Applicant(s)**

VAN GOMPEL ET AL.

**Examiner**

Michele Kidwell

**Art Unit**

3761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 17 September 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) See Continuation Sheet is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1, 2, 4, 7, 10, 11, 15, 16, 18, 20, 21, 23, 28, 29, 33, 34, 37, 38, 40, 43, 46, 47, 51, 52 and 55 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-848)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

Continuation of Disposition of Claims: Claims pending in the application are 1,2,4,7,10,11,15,16,18,20,21,23,28,29,33,34,37,38,40,43,46,47,51,52 and 55.

## **DETAILED ACTION**

### ***Response to Arguments***

In view of the appeal brief filed on September 17, 2008, PROSECUTION IS HEREBY REOPENED. A new ground of rejection is set forth below.

To avoid abandonment of the application, appellant must exercise one of the following two options:

(1) file a reply under 37 CFR 1.111 (if this Office action is non-final) or a reply under 37 CFR 1.113 (if this Office action is final); or,

(2) initiate a new appeal by filing a notice of appeal under 37 CFR 41.31 followed by an appeal brief under 37 CFR 41.37. The previously paid notice of appeal fee and appeal brief fee can be applied to the new appeal. If, however, the appeal fees set forth in 37 CFR 41.20 have been increased since they were previously paid, then appellant must pay the difference between the increased fees and the amount previously paid.

A Supervisory Patent Examiner (SPE) has approved of reopening prosecution by signing below:

***/Tatyana Zalukaeva/  
Supervisory Patent Examiner, Art Unit 3761***

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1 – 2, 7, 10 – 11, 15 – 16, 18, 20 – 21, 28 – 29, 33 – 34, 37 – 38, 43, 46 – 47, 51 – 52 and 55 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mishima et al. (US 6,913,599) in view of Sauer (US 5,957,907) and further in view of Carr et al. (US 5,462,537).

As to claims 1 – 2, Mishima et al. (hereinafter "Mishima") a disposable garment having a garment length, the disposable garment comprising: an outer layer (5) and an elastic inner layer (7), wherein the elastic inner layer has the claimed perimeter and claimed opening (8) as shown in figures 1 and 7. The perimeter of the inner layer is bonded to the perimeter of the outer layer (col. 1, lines 21 – 25) and both the inner and outer layer form the claimed regions as shown in figures 1 and 7. Likewise, figure 7 shows the narrowest portion garment to be located in the crotch region.

The difference between Mishima and claim 1 is the provision that the opening has length that is 10% to 90% of the garment length and that the crotch region is equal or less than 4 inches.

The examiner notes that "a garment length" is not necessarily reflective of the entire length of the garment, and as such, any length thereof may be considered in conjunction with the disclosed openings in order to meet the claimed limitations. Nevertheless, Saur teaches an absorbent article having a central opening that is between 10% and 90% of the garment length as set forth in col. 9, lines 55 – 59.

Likewise, Carr teaches a garment wherein the crotch region is less than 4 inches as set forth in col. 4, lines 13 – 19.

It would have been obvious to one of ordinary skill in the art to modify the opening of Mishima with the dimensions taught by Saur in order to provide improved containment and isolation of exudates as taught by Saur in col. 9, lines 55 - 65. Further, it would have been obvious to one of ordinary skill in the art to provide the crotch of Mishima with the dimensions taught by Carr because the crotch region of less than 4 inches permits the absorbent structure to fit closely and conformably to the perineum area as taught by Carr in col. 4, lines 13 – 19.

With reference to claims 7 and 43, Mishima discloses a pleated outer layer as set forth in figure 1 – 2 where the area surrounding the leg openings is pleated.

As to claims 10 – 11, 28 – 29 and 46 – 47, Mishima discloses a liquid impermeable (col. 7, lines 3 - 15) inner layer that is elastic in both the longitudinal and lateral direction as set forth in col. 3, lines 37 - 41.

With respect to claims 15 – 16, 33 – 34 and 51 – 52, the examiner refers to figure 1 of Mishima which shows the article with the inner layer having an opening (8) therein. In this case, the outer layer would ultimately have a length and width that is greater than that of the inner layer because the inner layer is interrupted by the opening (8) while the outer layer spans continuously though the area of the opening as shown in figure 1.

As to claim 18, Mishima discloses a garment wherein the narrowest crotch region is toward the front waist region as set forth in figures 1 and 7.

With reference to claims 20 – 21, see the rejection of claim 1. The examiner contends that the outer layer retraction value may be considered less than the retraction value of the elastic inner layer because the outer layer is not formed from elastic materials while the inner layer is as set forth in col. 7, lines 3 – 15 and lines 17 – 37.

Regarding claims 37 – 38, see the rejection of claim 1. Mishima also an absorbent assembly positioned between the outer layer and the elastic inner layer wherein the absorbent assembly includes a topsheet layer (4), a core (6) and a barrier (15) as set forth in figure 6.

As to claim 55, Mishima discloses a garment wherein the absorbent assembly is attached to the outer layer along a lateral centerline of the absorbent assembly as set forth in figure 4.

Claims 4, 23 and 40 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mishima in view of Sauer and Carr and further in view of Blenke et al. (US 6,129,720).

The difference between Mishima in view of Sauer and Carr is the provision that the outer layer is elastic.

Blenke et al. (hereinafter "Blenke") teaches an absorbent article with an elastic outer cover(26) as set in col. 8, lines 25 – 67.

It would have been obvious to one ordinary skill in the art to provide the article of Mishima in view of Sauer and Carr with an elastic outer cover because the use of such permits the garment to extend and expand about the wear for improved conformability as taught by Blenke in col. 5, lines 55 - 64.

With respect to claims 23 and 40, see the rejection of claim 4.

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thornton*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.



Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1 – 2, 4, 7, 10 – 11, 15 – 16, 18, 20 – 21, 23, 28 – 29, 33 – 34, 37 – 38, 40, 43, 46 – 47, 51 – 52 and 55 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1 – 16 of U.S. Patent No. 7,344,523. Although the conflicting claims are not identical, they are not patentably distinct from each other because both the instant application and U.S. Patent No. 7,344,523 are directed to an absorbent garment with an elastic inner layer including an opening in the crotch region.

Claims 1 – 2, 4, 7, 10 – 11, 15 – 16, 18, 20 – 21, 23, 28 – 29, 33 – 34, 37 – 38, 40, 43, 46 – 47, 51 – 52 and 55 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1 – 64 of U.S. Patent No. 7,329,794. Although the conflicting claims are not identical, they are not patentably distinct from each other because both the instant application and U.S. Patent No. 7,329,754 are directed to an absorbent garment with an elastic inner layer including an opening in the crotch region.

Claims 1 – 2, 4, 7, 10 – 11, 15 – 16, 18, 20 – 21, 23, 28 – 29, 33 – 34, 37 – 38, 40, 43, 46 – 47, 51 – 52 and 55 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1 – 38 of copending Application No. 10/879,323. Although the conflicting claims are not identical, they are not patentably distinct from each other because both the instant application

and the copending application are directed to an absorbent garment with an elastic inner layer including an opening in the crotch region.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claims 1 – 2, 4, 7, 10 – 11, 15 – 16, 18, 20 – 21, 23, 28 – 29, 33 – 34, 37 – 38, 40, 43, 46 – 47, 51 – 52 and 55 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1 – 51 of copending Application No. 10/750,402. Although the conflicting claims are not identical, they are not patentably distinct from each other because both the instant application and the copending application are directed to an absorbent garment with an elastic inner layer including an opening in the crotch region.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michele Kidwell whose telephone number is 571-272-4935. The examiner can normally be reached on Monday thru Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Tatyana Zalukaeva can be reached on 571-272-1115. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 3761

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Michele Kidwell/  
Primary Examiner, Art Unit 3761

/Tatyana Zalukaeva/  
Supervisory Patent Examiner, Art Unit 3761